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Paper No. 24

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**JUN 14 2005**

**OFFICE OF PETITIONS**

In re Patent of :  
Smith :  
Patent No. 5,598,947 :  
Issue Date: February 4, 1997 :  
Application No. 08/377,449 :  
Filing Date: January 24, 1995 :  
For: Automatic Hot Food Vending Machine :

Decision on Petition

This is a decision on the petition under 37 CFR 1.378(b), filed February 14, 2005, and supplemented May 24, 2005, to reinstate the above-identified patent. This is also a decision on the petition filed in the alternative under 37 CFR 1.378(c).

The petition under 37 CFR 1.378(b) is **dismissed**.

The petition under 37 CFR 1.378(c) is **dismissed**.

**Facts:**

The patent issued February 4, 1997. The 7.5 year maintenance fee could have been paid from February 4, 2004, through August 4, 2004, or with a surcharge during the period from August 5, 2004, to February 4, 2005.

Petitioner alleges \$1,110 was mailed via certified mail to the Office on Saturday, February 5, 2005.

The payment was received on February 14, 2005.

The amount due for maintenance fees is set by statute and Congress usually changes these fees once or twice a year.

Petitioner has supplied a page, printed from the Office's website, indicating the fee amount due for the 7.5 year fee as \$1,045. The page was printed on August 3, 2004. On August 3, 2004, the fee amount due for a small entity submitting the 7.5 year fee was \$1,045.

Congress raised the fee to \$1,075 effective October 1, 2004.

Congress raised the fee to \$1,150 effective December 8, 2004.

The patent expired at midnight on February 4, 2005, because the fee was not timely submitted and because the payment amount was incorrect.

When one mails correspondence by certified mail, the effective date for the correspondence is the date the correspondence is received and not the date the correspondence is mailed. The fee was due by midnight of February 4, 2005. The fee was not received until February 14, 2005.

Even if the payment was accorded the date the payment was mailed, the payment would be untimely. The payment was due by midnight on February 4, 2005. The payment was not mailed until February 5, 2005.

On February 4, 2005, the maintenance fee due was \$1,150 and the surcharge due was \$65. Petitioner does not contend \$1,215 was submitted. Petitioner alleges \$1,010 was paid. The statute required \$1,215 to be paid to prevent expiration of the patent. The required fee was not paid and the patent therefore expired.

**Analysis:**

**The petition under 37 CFR 1.378(b)**

A petition to accept the unavoidably delayed payment of an unavoidably delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by:

- (1) payment of the appropriate maintenance fee, unless previously submitted;
- (2) payment of the appropriate surcharge set forth in 37 CFR 1.20, and
- (3) a showing to the satisfaction of the Commissioner that the entire delay in paying the required maintenance fee from the due date for the fee until the filing of a grantable petition pursuant to this paragraph was unavoidable.

As to (1) and (2), the maintenance fee due for a small entity after 7.5 years is currently \$1,150, and the surcharge is \$700. Petitioner has only submitted \$1,010.

As to (3), petitioner has not paid the full maintenance fee. Therefore, petitioner has not, and can not, prove the entire delay from the due date of the fee until payment of the full fee was unavoidable.

**The petition under 37 CFR 1.378(c)**

A petition to accept the unavoidably delayed payment of an unavoidably delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(c) must be accompanied by:

- (1) payment of the appropriate maintenance fee, unless previously submitted;
- (2) payment of the appropriate surcharge set forth in 37 CFR 1.20, and
- (3) a statement that the entire delay in the submission of the fee was unintentional.

As to (1) and (2), the maintenance fee due for a small entity after 7.5 years is currently \$1,150, and the surcharge is \$1,640. Petitioner has only submitted \$1,010.

As to (3), petitioner has not paid the full maintenance fee. Therefore, petitioner can not state the entire delay from the due date of the fee until payment of the full fee was unintentional.

**Petitioner's current options:**

**I. Petitioner may file a request for reconsideration under 37 CFR 1.378(b).**

If reconsideration of this decision is desired, a petition for reconsideration must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this two-month time limit can be granted under 37 CFR 1.136(a) or (b).

The petition for reconsideration should be entitled "Petition for Reconsideration under 37 CFR 1.378(b)."

Any petition for reconsideration of this decision must be accompanied by a non-refundable petition fee of \$400 as set forth in 37 CFR 1.17, the \$140 still owed for the maintenance fee, and the \$700 surcharge. In other words, any request for reconsideration must be accompanied by a total of \$1,240.

Any petition for reconsideration of this decision under the unavoidable standard must also be accompanied by a showing to the satisfaction of the Commissioner that the entire delay in paying the required maintenance fee from the due date for the fee until the filing of a grantable petition pursuant to this paragraph was unavoidable.

Petitioner may wish to note that, in general, nonawareness of the content of, or a misunderstanding of, PTO statutes, PTO rules, the MPEP, or Official Gazette notices, will not constitute unavoidable delay.<sup>1</sup> For example, a patentee is responsible for knowing when various fees are due and determining the correct amount to pay for the fees.

It is extremely important that petitioner supply any and all relevant information and documentation with his request for reconsideration. The Commissioner's decision will be based solely on the administrative record in existence. Petitioner should remember that it is not enough that the delay was unavoidable; petitioner must prove that the delay was unavoidable. A petition will not be granted if petitioner provides insufficient evidence to "show" that the delay was unavoidable. Therefore, if a request for reconsideration is filed, it must establish that the entire delay in the submission of the maintenance fee was unavoidable.

## II. Petitioner may file a request for reconsideration under 37 CFR 1.378(c).

If reconsideration of this decision is desired, a petition for reconsideration must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this two-month time limit can be granted under 37 CFR 1.136(a) or (b).

The petition for reconsideration should be entitled "Petition for Reconsideration under 37 CFR 1.378(c)."

Any petition for reconsideration of this decision must be accompanied by a non-refundable petition fee of \$400 as set forth in 37 CFR 1.17, the \$140 still owed for the maintenance fee, and the \$1,640 surcharge. In other words, any request for reconsideration must be accompanied by a total of \$2,180.

Any petition for reconsideration of this decision under the unintentional standard must also be accompanied by a statement that the delay in the submission of the fee was unintentional. Petitioner does not have to supply proof the delay was unintentional but may merely supply a statement.

A copy of a blank petition form PTO/SB/66 is enclosed for petitioner's convenience. As an alternative to writing a check, or mailing a money order, petitioner may pay the required

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<sup>1</sup> See Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (Fed. Cir. 1982) (citing Potter v. Dann, 201 U.S.P.Q. (BNA) 574 (D. D.C. 1978) for the proposition that counsel's nonawareness of PTO rules does not constitute "unavoidable" delay); Vincent v. Mossinghoff, 1985 U.S. Dist. LEXIS 23119, 13, 230 U.S.P.Q. (BNA) 621 (D. D.C. 1985) (Plaintiffs, through their counsel's actions, or their own, must be held responsible for having noted the MPEP section and Official Gazette notices expressly stating that the certified mailing procedures outlined in 37 CFR 1.8(a) do not apply to continuation applications.) (Emphasis added).

additional funds by credit card. A credit card authorization form is enclosed for petitioner's convenience.

III. Petitioner may request a refund of the maintenance fee and surcharge which accompanied the petition.

Petitioner may request a refund of the \$1,010 submitted for the 7.5 year maintenance fee by writing to: Mail Stop 16, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450. A copy of this decision should accompany petitioner's request.

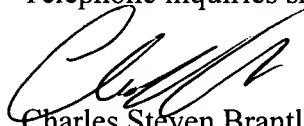
Further correspondence with respect to this matter should be addressed as follows:

By mail:        Mail Stop Petition  
                  Commissioner for Patents  
                  P.O. Box 1450  
                  Alexandria, VA 22313-1450

By facsimile: (703) 872-9306  
                  Attn: Office of Petitions

If a request for reconsideration is filed, and a decision on the new petition is not received within three months, petitioner may wish to call the number below to check on the status of the renewed petition.

Telephone inquiries should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



Charles Steven Brantley  
Petitions Attorney  
Office of Petitions

Attached:        PTO/SB/66  
                  Credit Card Authorization Form